

PUBLIC HEARING  
BEFORE THE  
CALIFORNIA ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION

In the Matter of: )  
 )  
Proposed Adoption of Revisions and ) Docket No.  
Amendments to Rules of Practice and ) 04-SIT-02  
Procedure and Power Plant Site )  
Certification Regulations )  
\_\_\_\_\_ )

CALIFORNIA ENERGY COMMISSION  
HEARING ROOM A  
1516 NINTH STREET  
SACRAMENTO, CALIFORNIA

WEDNESDAY, JANUARY 17, 2007

1:04 P.M.

Reported by:  
Peter Petty  
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PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

COMMISSIONERS PRESENT

John L. Geesman, Presiding Member, Siting  
Committee

Jeffrey D. Byron, Associate Member, Siting  
Committee

ADVISORS PRESENT

Kevin Kennedy

STAFF PRESENT

James W. Reede, Jr.

Kerry Willis

Eileen Allen

Roger Johnson

Arlene Ichien

PUBLIC ADVISER

Nick Bartsch for Margret Kim

ALSO PRESENT

Taylor Miller, Attorney  
Semptra Energy

Jeffery D. Harris, Attorney  
Ellison, Schneider and Harris, LLP  
on behalf of Calpine Corporation and LS Power

Ray Rouse, Attorney  
Galati and Blek, LLP

Marc D. Joseph, Attorney  
Adams, Broadwell, Joseph and Cardozo  
California Unions for Reliable Energy

Arrie Bachrach (via teleconference)  
ENSR

## I N D E X

	Page
Proceedings	1
Introductions	1
Opening Remarks	1
Presiding Member Geesman	1
Proceeding Update and Review	3
Public Comment	7
Marc Joseph, CURE	7
Jeffery Harris, Calpine, LS Power	13
Taylor Miller, Semptra Energy	21
All Topics	31
General Public Comment	31
Proposed Schedule	42
Adjournment	46
Certificate of Reporter	47

1 P R O C E E D I N G S

2 1:04 p.m.

3 PRESIDING MEMBER GEESMAN: This is a  
4 hearing of the California Energy Commission's  
5 Siting Committee for the purpose of considering  
6 adoption of revisions and amendments to the Energy  
7 Commission's rules of practice and procedure in  
8 power plant site certification regulations.

9 I'm John Geesman, the Presiding Member  
10 of the Commission's Siting Committee. To my  
11 right, Commissioner Jeffrey Byron, the Associate  
12 Member of the Committee. To his right, Kevin  
13 Kennedy, his Staff Advisor.

14 Dr. Reede.

15 DR. REEDE: Good afternoon, Presiding  
16 Commissioner Geesman and Commissioner Byron. My  
17 name is Dr. James Reede, and I'm the Energy  
18 Facility Siting Project Manager assigned the task  
19 of amending our siting regulations.

20 With me is senior staff counsel Ms.  
21 Kerry Willis. We also have deputy chief counsel  
22 Arlene Ichien. We have the siting office manager,  
23 Mr. Roger Johnson. We have the siting program  
24 manager Ms. Eileen Allen.

25 We have other staff available as

1       necessary and that includes Mr. David Flores for  
2       land use/visual resources, socioeconomics and  
3       traffic and transportation. We have Ms. Beverly  
4       Bastian for cultural resources. We have Ms.  
5       Amanda Stennick for land use and socioeconomics.  
6       We have Mr. Mark Hesters for transmission system  
7       engineering. And we have Mr. Keith Golden for air  
8       quality.

9               And the Public Adviser's Office is  
10       represented by Mr. Nick Bartsch.

11              At this time, it would be appropriate,  
12       with your permission, to ask the public  
13       participants to introduce themselves.

14              PRESIDING MEMBER GEESMAN: Yes, Taylor,  
15       why don't we start with you.

16              MR. MILLER: I'm Taylor Miller with  
17       Sempra Energy.

18              MR. HARRIS: Good afternoon; Jeff Harris  
19       with Ellison, Schneider and Harris on behalf of  
20       Calpine Corporation and LS Power.

21              MR. ROUSE: Ray Rouse on behalf of  
22       Galati and Blek.

23              MR. JOSEPH: Marc Joseph on behalf of  
24       the California Unions for Reliable Energy.

25              DR. REEDE: And we do have somebody on

1 the phone, Commissioner Geesman.

2 PRESIDING MEMBER GEESMAN: Whoever's on  
3 the phone, could you please identify yourselves?

4 MR. BACHRACH: This is Arrie Bachrach  
5 from ENSR; I don't know if anybody heard me or  
6 not.

7 DR. REEDE: Yes, we did.

8 MR. BACHRACH: Great, thank you.

9 PRESIDING MEMBER GEESMAN: Anyone else  
10 on the phone? Okay. Dr. Reede.

11 DR. REEDE: Thank you. As the  
12 proceeding has moved over the past years we have  
13 filed some of the cumulative actions, including a  
14 notice of proposed action that was filed with the  
15 Office of Administrative Law on December 22nd. It  
16 was posted in the California Regulatory Notice  
17 Register on December 29th. On December 21st we  
18 additionally sent out approximately 380 notices of  
19 proposed actions to those interested parties and  
20 those who have identified themselves as having an  
21 interest in the proceeding.

22 We also filed an initial statement of  
23 reasons as required by the Administrative  
24 Procedure Act. And filed the economic and fiscal  
25 impact statement as required by the Department of

1 Finance and the Administrative Procedure Act.

2 The economic and fiscal impact statement  
3 had been approved by the Department of Finance on  
4 September 26th.

5 At this time, with your permission,  
6 Commissioner Geesman, I wanted to give a very  
7 brief history of this proceedings and the  
8 agreements that have been reached to date before  
9 we go to the staff presentation of topics or  
10 public participant comments.

11 PRESIDING MEMBER GEESMAN: Please  
12 proceed.

13 DR. REEDE: At the first hearing on  
14 September 20, 2006, under the rules of practice  
15 and procedure -- excuse me, could you scroll down?  
16 We also have this on the big screens if anybody  
17 wants to see it. Excuse me.

18 No comments were received from any of  
19 the public participants on rules of practice and  
20 procedures section 1002, 1201, 1208, 1209, 1219,  
21 1709.7, 1710, 1717, 1720.3, '.4, '.5 and '.6, and  
22 1747.

23 No comments were received on appendix B  
24 information requirements relating to alternatives,  
25 efficiency, facility design, hazardous material

1 handling, reliability, soils or transmission  
2 system engineering.

3 Comments were requested of public  
4 participants. And at the hearing held on November  
5 13th, due to staff's acceptance of various written  
6 comments and/or agreed-to changes from the  
7 previous workshops, no additional comments were  
8 forthcoming on appendix B information  
9 requirements, biological resources, geological  
10 hazards and resources, noise, paleontological  
11 resources, traffic and transportation,  
12 transmission line safety and nuisance and worker  
13 safety and fire protection.

14 The rules of practice and procedures  
15 that were agreed to are 1207, 1209.5, 1213, 1217,  
16 1702, 1708 and 1721.

17 At the November 13th hearing held here  
18 at the Commission there were agreed-to oral  
19 comments by staff -- between and by staff and the  
20 public participants in the areas of air quality,  
21 cultural resources, land use, project overview,  
22 public health, socioeconomics, visual resources,  
23 waste management and water resources.

24 The rules of practice and procedures  
25 agreed to by the parties were 1216, 1716, 1720 and



1 1744.

2 Subsequent to the publishing of the --  
3 okay. I will now turn it over to Ms. Kerry Willis  
4 who will discuss the errata that was issued  
5 subsequent to the filing of the notice of proposed  
6 action, which will be subject to a notice of  
7 proposed change.

8 MS. WILLIS: Thank you. As you probably  
9 picked up on you way in we had an errata sitting  
10 on the side table on section 1720 on  
11 reconsideration of decision or order.

12 We have added a sentence at the bottom:  
13 In addition to being served on all parties as  
14 required by section 1210, the petition for  
15 reconsideration shall be filed with the Chief  
16 Counsel of the Commission.

17 It was brought to our attention recently  
18 that the Chief Counsel was not getting copies of  
19 the reconsideration petition. And this would  
20 correct that condition.

21 DR. REEDE: Additionally, in appendix B,  
22 information requirements for an application, Mr.  
23 Jeff Harris had requested a slight modification  
24 for clarification purposes to paleontological  
25 resources paragraph (d) that did not find its way

1       into the paperwork that was filed in the  
2       California Register.

3               We subsequently have included that in  
4       the errata and basically it reads: Information on  
5       the specific location of known paleontological  
6       resources survey reports, locality reports, and  
7       maps at a scale of 1:24,000 showing occurrence of  
8       fossil finds" -- and the operative words are "if  
9       known within a one-mile radius of the project and  
10      related facilities, et cetera.

11              Those, at this point in time, are the  
12      only two changes that are currently proposed to  
13      the filings of the notice of proposed action.

14              At this time, Commissioner Geesman, it  
15      may be appropriate to poll the participants to see  
16      if they have any additional areas of unreadiness  
17      beyond which we've already agreed to.

18              PRESIDING MEMBER GEESMAN: Well, why  
19      don't we do that. I'm not certain that I know how  
20      to frame the question in terms of areas of  
21      unreadiness, but are there areas of the regs that  
22      you're concerned with that you think merit further  
23      discussion today? Marc.

24              MR. JOSEPH: Thank you, Commissioners.  
25      There are two sections, comments on two sections,

1       one of which is technical and one which is more  
2       policy oriented.

3               The first is on section 1216, ex parte  
4       contacts.

5               DR. REEDE: 1216.

6               MR. JOSEPH: The new language would  
7       eliminate the existing Commission regulations on  
8       ex parte contacts and instead substitute the APA  
9       language.

10              The language in the Government Code,  
11       which is referenced, all constrains contacts with  
12       what they phrase as, quote, "the presiding  
13       officer". And with the elimination of the  
14       Commission's prior language, which said  
15       Commissioners and assigned Hearing Officers shall  
16       avoid, it raises the question in this context who  
17       is or who are people who are constrained by the  
18       phrase the presiding officer.

19              I think to make this regulation clear to  
20       all concerned, a sentence should be added to  
21       1216(a) which says something like for purposes of  
22       Government Code sections 11430.10, et seq,  
23       presiding officer means. And then you need to  
24       fill in the blank. And I think you should fill in  
25       the blank with Commissioners and the assigned

1       Hearing Officer.

2               PRESIDING MEMBER GEESMAN: Does staff  
3       have a response to that?

4               MS. WILLIS: We talked about this  
5       earlier. I believe, and I don't have the APA in  
6       front of me, that section, but there is also a  
7       definition of presiding officer in another  
8       section, which I could get quickly.

9               But our understanding was that presiding  
10      officer would also mean the hearing officer, as  
11      well. We also added or included (b) that also  
12      that would include advisors and advisor to the  
13      commissioner, or any other member of the  
14      commissioner's own staff should not be used in any  
15      manner that would circumvent the purposes and  
16      intent of this section. Just to keep that so that  
17      if there was any concern about advisors, as well.

18              MR. JOSEPH: It's certainly possible  
19      that I missed the definition someplace, but I  
20      thought I looked from beginning to end of the  
21      appropriate section. And if I missed it and  
22      there's someplace else that makes it clear, that's  
23      fine.

24              But I think, you know, in the Energy  
25      Commission context it should be clear because the

1 APA is written in the context of adjudicatory  
2 hearings which are run solely by a single person.

3 PRESIDING MEMBER GEESMAN: Would it be  
4 somewhere other than 1702, which defines presiding  
5 member, but not presiding officer?

6 MS. WILLIS: Under Government Code  
7 section 11405.80 it says: Presiding officer means  
8 the agency head, member of the agency head,  
9 administrative law judge, hearing officer or other  
10 person who presides at an adjudicative proceeding.  
11 That was the definition in the APA.

12 MR. JOSEPH: Okay, so does that include  
13 all five Commissioners or not? I don't think you  
14 would be described as agency heads. And I'm not  
15 sure who we would call as presiding at a hearing.  
16 Is it the hearing officer, is it presiding  
17 commissioner? Is it the associate commissioner?

18 I just don't think you should leave this  
19 uncertain as to who ex parte contacts are  
20 prohibited with. And for the price of one  
21 sentence, I think all uncertainty could be  
22 eliminated.

23 MS. WILLIS: I don't have an issue with  
24 that.

25 PRESIDING MEMBER GEESMAN: Well, I'm

1       against ambiguity, and I think we had discussed  
2       this before. We'd hopefully cleared up the  
3       ambiguity, but I think Marc makes a good point.

4               MS. WILLIS: Okay. We'll write out a  
5       sentence and make that change.

6               PRESIDING MEMBER GEESMAN: Okay.

7               DR. REEDE: That would be published in  
8       the notice of proposed change.

9               PRESIDING MEMBER GEESMAN: Understood.

10              MR. JOSEPH: The second comment I had is  
11       something which I did raise before, and if this  
12       horse is dead, I will stop beating it.

13              In 1217 the authorization to use  
14       informal hearings, I have no problem with that. I  
15       think -- I remain concerned that Government Code  
16       section 11445.40 is written so broadly that it can  
17       swallow up much of the rest of the these rules  
18       which we are finely crafting.

19              That Government Code section says the  
20       presiding officer may limit or eliminate the use  
21       of pleadings, intervention, discovery, prehearing  
22       conferences and rebuttal. That seems like just  
23       about all of the process. And I am nervous that  
24       that gives such incredible unfettered discretion  
25       that the Commission's fundamental process could be

1       eliminated. I'm sure that's not what anybody  
2       intends at this moment. I'm sure people have in  
3       mind the opportunity for some kind of less-than-  
4       formal hearing, but the way it's written, it's  
5       carte blanche to do away with the whole process.

6               PRESIDING MEMBER GEESMAN: Well, I'm  
7       afraid that unless Commissioner Byron feels  
8       differently, this one does fall into a category of  
9       dead barnyard animal. We have taken this up  
10      before, and I tried to provide my assurances that  
11      not only is that not the intent, but I think our  
12      practice to date provides a pretty compelling  
13      rebuttal to that.

14             We've actually, I think, during the  
15      cases that I've sat on, achieved some of our  
16      greatest progress when we've utilized what  
17      informal approaches have been available to us. I  
18      don't think there's any desire there to intrude on  
19      anyone's due process rights. And certainly the  
20      Commission has a long tradition of extending the  
21      opportunity to participate to any and all comers.

22             So the only advice I can provide you,  
23      again, unless Commissioner Byron feels that this  
24      is something we should delve into again, the only  
25      advice I can provide you would be monitor us very

1       closely, as I know you do. And bring it to the  
2       full Commission's attention the first time you  
3       detect any of the types of difficulties you're  
4       referring to occurring in any case.

5               I can provide you, I think, strong  
6       assurances that will be corrected immediately.

7               MR. JOSEPH: Thank you. I appreciate  
8       your clarification on the record. I know that's  
9       not your intent. I know that the history and  
10      practice of the Commission has been exemplary. My  
11      concern is the persnickety of the lawyer in me  
12      who reads the actual words.

13              ASSOCIATE MEMBER BYRON: Commissioner, I  
14      concur.

15              PRESIDING MEMBER GEESMAN: Okay.

16              MR. JOSEPH: Thank you.

17              PRESIDING MEMBER GEESMAN: Other  
18      comments from the participants?

19              MR. HARRIS: I guess in the category of  
20      things I thought we had decided, but didn't show  
21      up in the draft, I have just a couple for  
22      consideration.

23              One was in 1751, and I think -- which is  
24      the Presiding Member's Proposed Decision, and the  
25      basis for that. And there were several changes to



1       that section, and ultimately I think the staff  
2       dropped most of them.

3               But the one clarification that I think  
4       we were talking about was that the language now  
5       says that the -- 1751?

6               MS. WILLIS: There's no changes in 1751.

7               MR. HARRIS: Yeah, I know, and my  
8       suggestion is that there should have been and it  
9       got missed. Only because I thought we agreed to  
10      that. So, if I'm wrong, obviously I'm wrong on  
11      that.

12              I thought that you were going to change  
13      the language of 1751 to say, based exclusively on  
14      the evidentiary record. And strike out the term  
15      the hearing record. Because as it reads now, it  
16      says: based exclusively upon the hearing record,  
17      including the evidentiary record," and so I  
18      thought the clarification we all agreed to was to  
19      change that to: based exclusively upon the hearing  
20      record."

21              MS. WILLIS: I think there was a lot of  
22      discussion over that issue, and when I took it  
23      back to our legal office and the siting office, we  
24      decided just to leave the section as-is.

25              MR. HARRIS: Okay. Well, I thought that

1 clarification was useful because --

2 PRESIDING MEMBER GEESMAN: I have to say  
3 I'm not familiar with the discussion on this  
4 topic. If you feel that there's value in it, we  
5 can get into it now.

6 MR. HARRIS: Well, this was in Calpine's  
7 filed comments. There were a lot of changes to  
8 1751 which you rejected wisely. But there was  
9 one, the first change was this clarification  
10 striking out the words "including the evidentiary  
11 record". So it would say that the: PMPD shall be  
12 based exclusively upon the hearing record."

13 And the hearing record is a defined  
14 term, and so I just thought that was a  
15 clarification worth making. Because there is  
16 confusion, especially among intervenors about, you  
17 know, if it gets in the docket is it in the  
18 record. It's not. So I just thought making the  
19 hearing record the defined term would clarify  
20 that.

21 But, again, this is not -- it's not a  
22 huge issue; just something I thought we had agreed  
23 on; in my review pointed out.

24 ASSOCIATE MEMBER BYRON: Excuse me, if I  
25 may interrupt. I'm not up where you all are yet.

1 I can't find 1751, and we haven't discussed the  
2 name of the section. So, I'm at a loss here.

3 DR. REEDE: The proposed changes to 1751  
4 were dropped.

5 MR. HARRIS: Right, so it's not in your  
6 draft.

7 PRESIDING MEMBER GEESMAN: So it's not  
8 in your document.

9 ASSOCIATE MEMBER BYRON: Okay.

10 MR. HARRIS: Commissioner, it's in the  
11 existing regulations and the staff document only  
12 has proposed changes, so you wouldn't have it in  
13 front of you.

14 ASSOCIATE MEMBER BYRON: We have it now.

15 MR. HARRIS: I cheated, I pulled it up  
16 electronically, so.

17 MS. WILLIS: I think, Jeff, part of the  
18 reason why evidentiary record wasn't included was  
19 there wasn't a definition in the definitions; it  
20 was hearing record was defined.

21 MR. HARRIS: Right.

22 MS. WILLIS: And that's why we just left  
23 it as-is.

24 MR. HARRIS: My point is I think as-is  
25 it's wrong. I think --

1                   PRESIDING MEMBER GEESMAN: As-is  
2 contains the reference to evidentiary record.

3                   MS. WILLIS: But it's based on the  
4 hearing record. I think that was why the decision  
5 was made to keep it as-is.

6                   MR. HARRIS: I don't want to spend a lot  
7 of capital on this one. I've made my point, I  
8 think.

9                   PRESIDING MEMBER GEESMAN: It's the  
10 semanticist in me that I guess is having a hard  
11 time here. What's the difference between the  
12 hearing record and the evidentiary record in the  
13 judgment of staff?

14                  MS. WILLIS: The hearing record is  
15 actually what is part of the hearing. So it would  
16 be whatever is entered into the record at the  
17 hearing. It could be including public comment and  
18 other comments made at the hearing, as opposed to  
19 just the evidence that would be entered into the  
20 evidentiary record.

21                  So, the hearing record is broader than  
22 just the evidentiary record.

23                  PRESIDING MEMBER GEESMAN: But the  
24 hearing record includes the evidentiary record?

25                  MS. WILLIS: That's correct.

1                   PRESIDING MEMBER GEESMAN: The hearing  
2                   record is a defined term?

3                   MS. WILLIS: That's correct.

4                   PRESIDING MEMBER GEESMAN: The  
5                   evidentiary record is not a defined term?

6                   MS. WILLIS: That's correct. Well, the  
7                   evidentiary record, I believe, is defined.  
8                   Legally it's defined as the evidence that's  
9                   introduced under oath.

10                  PRESIDING MEMBER GEESMAN: Not defined  
11                  term in these regs?

12                  MS. WILLIS: But not in these regs.

13                  PRESIDING MEMBER GEESMAN: Does it  
14                  really help us to have the reference to the  
15                  evidentiary record in these regs?

16                  MS. WILLIS: As someone who's worked in  
17                  the hearing office, yes, it did. I mean, we rely  
18                  on the evidence that's introduced as part of the  
19                  evidentiary record, the basis of the --

20                  DR. REEDE: Ms. Arlene Ichien, the  
21                  deputy chief counsel, would like to address the  
22                  Committee.

23                  MS. ICHIEN: With respect to the words,  
24                  with respect to the evidentiary record that was  
25                  included in section 1751, that was actually at the

1 request of the Secretary of Resources when these  
2 regulations went back for review, as directed by  
3 statute, for our certification as a regulatory  
4 program under CEQA.

5 And it was at that time that the  
6 Secretary and her general counsel recommended that  
7 that section include reference to the evidentiary  
8 record as being a part of the hearing record.

9 PRESIDING MEMBER GEESMAN: Well, that's  
10 enough for me.

11 MS. ICHIEN: And also for further  
12 clarification, the evidentiary record is  
13 described, it's not defined, but it is described  
14 in effect in our regulations as being that  
15 testimony offered under oath and subject to cross-  
16 examination upon which the Commission can base its  
17 findings of fact.

18 And with respect to public comments that  
19 are in the hearing record, but not entered as  
20 evidence, as you know, they can be used to  
21 corroborate the evidentiary record, but can't, in  
22 themselves, support findings of fact.

23 PRESIDING MEMBER GEESMAN: Right. Okay.  
24 Other topics?

25 MR. HARRIS: One more on the category of

1 things that might of -- conforming changes. Get  
2 the right number, 1721. The staff has deleted  
3 references to 25309. Just in reviewing this I  
4 notice that there's also a reference in subsection  
5 (b) of 1721 to that same section which you struck  
6 before. So maybe that needs to be struck, as  
7 well. But, again, I don't particularly care about  
8 this, it's just something I noticed, looking at  
9 the regs.

10 PRESIDING MEMBER GEESMAN: So you're in  
11 1721(b)?

12 MR. HARRIS: Correct. I believe 17 --  
13 there's a 25309 is the -- is that the integrated  
14 assessment of need, is that what that is?

15 MS. WILLIS: Yeah, it's struck.

16 MR. HARRIS: Yeah.

17 MS. WILLIS: Now what are you --

18 MR. HARRIS: It should be struck in (b),  
19 right? I don't think you guys proposed to do  
20 that.

21 MS. WILLIS: It is struck in (b).

22 DR. REEDE: It is struck in (b).

23 MR. HARRIS: Is it? Okay, good.

24 DR. REEDE: It's struck in (b) and  
25 paragraph (1) right below it, it is struck in its

1       entirety. So both of those are out.

2               MR. HARRIS: Okay, thank you.

3               DR. REEDE: Thank you, Jeff.

4               PRESIDING MEMBER GEESMAN: Other topics?  
5       Taylor.

6               MR. MILLER: Yes, this is one that is  
7       not necessarily our primary interest, but I think  
8       as Jeff just mentioned is something I simply  
9       noticed in reviewing the regulations.

10              And this has to do with the bio and  
11       water sections. And we did have a discussion  
12       about this at the last workshop, and it had to do  
13       with permits from other agencies.

14              And the change was made in the bio  
15       section to require the identification of the other  
16       agencies in providing any correspondence to those  
17       agencies. And that's at the end of bio. And that  
18       change was made.

19              DR. REEDE: Could you say what page that  
20       is?

21              MR. MILLER: Okay, let's see here, if I  
22       got it right.

23              DR. REEDE: I'm turning as fast as I  
24       can. It would be page 38 of the document that  
25       shows December 14th on the front.



1                   MR. MILLER: Yeah. And that's where bio  
2 starts; and the section in question is at the  
3 bottom of page 41, it's capital H. And it reads:  
4 submit copies of any preliminary correspondence  
5 between the project applicant and the state and  
6 federal resource agencies and so on.

7                   It happens that on the next page, page  
8 42, a similar section was included for water. And  
9 when we had our discussion, and that's capital A,  
10 I believe we had agreed that a similar change  
11 would be made to the water section, to not require  
12 all the information required to apply for the  
13 permits, but rather identification of the agencies  
14 and the correspondence.

15                  And that's the way the statement of  
16 reasons seems to read, that that's the regional,  
17 if you go to the statement of reasons for water.

18                  And I didn't know if that change was not  
19 made intentionally, or perhaps it was just  
20 inadvertently overlooked.

21                  And the statement of reasons, if I can  
22 come up with that -- and that reads, that's on  
23 page 21 is the statement of reasons on water. And  
24 at the bottom of page 20, in the middle of that  
25 last paragraph there's a similar statement

1 relating to bio. So, it's not something we're  
2 staking a lot on, but I just thought for sake of  
3 consistency maybe that section should be reviewed.

4 DR. REEDE: Commissioner Geesman, my  
5 memory seems to tell me that we added the if  
6 applicable as a qualifier, so that they wouldn't  
7 have to show all the permits, or address all the  
8 permits; only those that were applicable.

9 PRESIDING MEMBER GEESMAN: Anyone on the  
10 technical staff have any first-hand recall here?

11 MR. JOHNSON: I'm Roger Johnson, siting  
12 office manager, and I'm covering for water folks  
13 today because they're out doing other things. And  
14 I don't have the personal recall of this.

15 I do remember a discussion. And I'd  
16 have to ask to go back and review the transcript  
17 of the meeting where we had this discussion to see  
18 how that --

19 MR. MILLER: I believe Paul Richins  
20 spoke to this issue; and I think you may have been  
21 out of the room at the time, too, as I recall.  
22 That's probably why Paul spoke to it.

23 MR. JOHNSON: So I can't answer your  
24 question right now, but I think we could quickly  
25 research it to see if there was a discussion and

1 agreement on that change.

2 MR. MILLER: I think the rationale that  
3 we discussed in connection with biology is similar  
4 here. It's just basically the issue that a lot of  
5 these permits, there's lots of permits listed  
6 here. And the way it's normally done is there's  
7 sort of an activity in parallel rather than in  
8 series on these permit applications. So that it  
9 would not necessarily be typical that you would  
10 have all the information for your water discharge  
11 permit or your underground injection permit or  
12 your 404 permit at the time the AFC is filed.

13 So that was the discussion we had on  
14 biology. And I believe I made the point that  
15 there was a parallel section under water where the  
16 same issue came up. So, --

17 PRESIDING MEMBER GEESMAN: Yeah, I think  
18 parallel logic would seem to apply to both. But I  
19 want to make certain that you guys track this down  
20 with the staff.

21 DR. REEDE: Yes. As I said, my  
22 recollection was that oftentimes we require a lot  
23 of that water information and discharge  
24 information in determining whether the application  
25 has the minimum amount required. And this is

1 information that is typically in either an NPDES  
2 permit, certification for waiver under section  
3 401, industrial waste discharge, or permit -- or  
4 the nationwide permits.

5 There's minimum information that's  
6 required. And what we had found out through a not  
7 necessarily good experience was that information  
8 that was supplied to one agency wound up different  
9 than what was supplied to us.

10 And I don't want to --

11 PRESIDING MEMBER GEESMAN: So, in this  
12 biology area you requested copies of preliminary  
13 correspondence.

14 DR. REEDE: Yes.

15 PRESIDING MEMBER GEESMAN: And why would  
16 a parallel approach in the water area not be  
17 something that the staff had previously agreed to?

18 DR. REEDE: Typically because of the  
19 long timeframes sometimes associated with those  
20 particular permits.

21 PRESIDING MEMBER GEESMAN: Well, you put  
22 us in a difficult position, because the relevant  
23 staff person is not here. And I --

24 DR. REEDE: I can send someone to go get  
25 the transcript off my desk. And we can look it up

1 real quick.

2 PRESIDING MEMBER GEESMAN: Okay. If you  
3 think that you can find that in a timely way why  
4 don't we take a ten-minute recess and --

5 MR. MILLER: Commissioner, as the one  
6 that started all this, I just want to make clear  
7 that we are happy to have this be taken up in  
8 consideration following the hearing if you want.  
9 We don't intend to disrupt anything by raising the  
10 matter.

11 PRESIDING MEMBER GEESMAN: Well, if we  
12 can get it resolved in ten minutes, let's do that.

13 MR. MILLER: Okay.

14 PRESIDING MEMBER GEESMAN: We'll be  
15 recessed for ten minutes.

16 (Brief recess.)

17 PRESIDING MEMBER GEESMAN: We're back on  
18 the record.

19 DR. REEDE: Are we back on?

20 PRESIDING MEMBER GEESMAN: We're back  
21 on.

22 DR. REEDE: Okay, thank you,  
23 Commissioner Geesman. I'm on page 153 of the  
24 November 13th transcript, line 11, where Mr.  
25 Miller's saying:

1           There was a change made in a very similar  
2           provision under biology 13(h) I think it was.  
3           And Mr. Harris says, where I wasn't rejected.  
4           Mr. Miller: Where that was we both made the  
5           same comments, and I think -- and I believe  
6           the change was made in bio and it just wasn't  
7           made under water, but it's the same issue, I  
8           think.

9           Mr. Richins: And what was the word staff  
10          used, do you remember? Mr. Miller: Under  
11          bio, you mean? Mr. Richins: Yeah. Mr.  
12          Miller: It's to make copies of preliminary  
13          correspondence between the project applicant  
14          and state and federal resource agencies  
15          regarding whether the federal or state  
16          permits or other agencies such as U.S. Fish  
17          and Wildlife, et cetera, will be required for  
18          the proposed project. That was the change in  
19          bio, and it was similar language prior to the  
20          change.

21          Mr. Harris: Well, maybe it's a  
22          different issue. Mr. Richins: No, they  
23          probably would be similar, but we do have the  
24          word "if applicable" in this regulation, and  
25          I wasn't quite sure if that was, maybe that

1           wasn't adequate for Jeff, I'm not sure.

2           Mr. Harris: I think my attorneys did a  
3           very good job. Mr. Richins: If that is the  
4           issue. Mr. Harris: I think not only these  
5           permits, we're not going to have all the  
6           information for the permits. We may have  
7           sent a letter to the Service saying we want,  
8           or send a letter to the Corps, do the  
9           clarification. I think if you took the  
10          language from bio that would solve that, look  
11          at that.

12          Mr. Richins: Okay, we'll take a look at  
13          that. Mr. Harris: Okay, try to look  
14          quickly. I'm sorry."

15          And then it goes on to talk about a  
16          different topic. But Mr. Richins' original  
17          comment was, we have, if applicable, which  
18          narrowly focuses what information would be  
19          required for a particular applicant. If they're  
20          going to be in the City of Burbank they have a lot  
21          different discharge requirements than someone out  
22          in the desert.

23          And that was Mr. Richins' comments. He  
24          took a look at it and felt that if applicable was  
25          there, then we're only talking providing

1 information for one of the permits, not all six  
2 that are listed as representative.

3 PRESIDING MEMBER GEESMAN: Taylor.

4 MR. MILLER: I don't think that goes to  
5 the issue. We wouldn't expect to provide  
6 information on permits that we aren't required to  
7 obtain. So the if applicable doesn't resolve the  
8 issue. The issue isn't which permits, it's all  
9 the information for the permits.

10 And you could assume in many cases all  
11 of these would be applicable. So, it goes to the  
12 issue of timing of application preparation, not  
13 the identification of the permits. So, I don't  
14 think the if applicable resolves the issue.

15 DR. REEDE: Commissioner Geesman, now in  
16 defense of staff, we have, in the past, have had  
17 to write a number of data requests when the  
18 necessary information on the characterization of  
19 the discharge was not included.

20 Additionally, we cannot determine if the  
21 minimum information from that particular agency or  
22 jurisdictions requirement needs are there.  
23 Typically applicants, in the past, have given us  
24 the information that they will be supplying to the  
25 regional discharge jurisdiction, so to speak.



1                   Then we know that at least that process,  
2           number one, is being started in a timely manner.  
3           Number two, that they've given us the same  
4           information that we need to get a letter of  
5           completeness from that jurisdiction.

6                   And if they are doing proper planning  
7           they're going to know what the discharge is, what  
8           TDLs of the water is going to be, where they're  
9           going to discharge it to, and in what quantities.  
10          That's typically all that's required on those  
11          permits.

12                   PRESIDING MEMBER GEESMAN: I think we're  
13          going to end up with the staff on this one. You  
14          know, I think the transcript makes pretty clear  
15          Mr. Richins' thought that the preferred approach  
16          from the staff's perspective was the if-applicable  
17          language, and does appear to have not committed  
18          anything other than taking a look at the parallel  
19          language in the biology section.

20                   So, heard your arguments. Got a pretty  
21          good understanding of them. And I believe that  
22          Dr. Reede has well summarized the staff  
23          perspective on this. I think we'll --

24                   MR. MILLER: That's fine.

25                   PRESIDING MEMBER GEESMAN: -- simply

1 side with the staff on it.

2 Other topics?

3 MR. HARRIS: Commissioner, how do you  
4 want to proceed? Do you want to take general  
5 comments, or do you want to march through the  
6 sections, or what would you like to --

7 PRESIDING MEMBER GEESMAN: Whichever  
8 would be easier from your standpoint. I don't  
9 have a clear sense as to how many comments you're  
10 likely to have.

11 MR. HARRIS: I've got a couple things I  
12 want to say, and that probably --

13 PRESIDING MEMBER GEESMAN: Okay, --

14 MR. HARRIS: -- then truncates a whole  
15 bunch of this stuff.

16 PRESIDING MEMBER GEESMAN: -- just go  
17 with that, then.

18 MR. HARRIS: I guess my general overall  
19 impression of this, and I was trying to come up  
20 with a better metaphor, but I can only either come  
21 up with "A Tale of Two Cities" or "A Tale of Two  
22 Haves." You know, one's really pedestrian and the  
23 other one's inapplicable.

24 But what I'm talking about there, the  
25 proposed changes to the rules of practice and

1 procedure, the first sections, the actual how  
2 we're going to operate this thing. I think those  
3 numbered sections for shorthand, I think staff's  
4 done a very good job in those sections. And one  
5 of the things I've consistently failed to do is  
6 praise staff on the record, so I'll remember to do  
7 it this time.

8 That there's a lot of good stuff in  
9 there, in those sections. Particularly the first  
10 sections, the numbered sections, the practice and  
11 procedure. Staff took out a lot of things that  
12 they initially proposed that we had pointed out  
13 issues with; and they'd accepted a lot of changes  
14 that we had proposed. And I really think it makes  
15 the process better. It's more clear.

16 And I think on all those things where  
17 there's common ground among staff and applicant,  
18 and by common ground I mean wanting to see the  
19 process work. You know, clearly and efficiently  
20 and in the public interest. I think on all those  
21 things you've done a very good job, and I have  
22 belated praise for the staff for their good hard  
23 work on that.

24 The second half, it's probably a good  
25 analogy for a Kings fan, hasn't been very good.

1       And I'm talking about appendix B in particular.  
2       And I went through and did a basic comparison  
3       between the initial statement, or the initial  
4       document prepared by staff, I think delivered in  
5       August, and what's proposed now. And as to  
6       appendix B, there haven't been that many changes.  
7       It's essentially the same document as staff  
8       proposed in August, and it creates the same issues  
9       that I think Taylor and Scott and Ray and I have  
10      been talking about.

11                So I wouldn't describe it as a complete  
12      disaster, but I would certainly describe it as a  
13      mitigated disaster.

14                There have been some improvements  
15      between that original version and this version.  
16      But by and large, I think the staff is over-  
17      reaching. I think that if you put a data request  
18      to them and said name one other state agency or  
19      local agency that requires the level of detail  
20      that you're asking for in cultural resources, they  
21      wouldn't be able to name another agency that asks  
22      for that level of detail. Especially on data  
23      adequacy. And that's really what we're focused on  
24      here.

25                That, I think, really pervades the

1        appendix B discussion. And really what staff has  
2        done in a lot of ways, has written down what their  
3        current practice is. And I think that practice  
4        involves a lot of over-reaching.

5                My opinion is the appendix B materials  
6        essentially eviscerate the discovery process. I  
7        think there's a discovery process for reason;  
8        that's the reason you put the regulations together  
9        the way they did. I think raising the bar,  
10       especially on issues like cultural and air and  
11       water and bio and a handful of other ones, as high  
12       as you've raised it really does move that  
13       discovery forward.

14               I don't think you're going to be able to  
15       make the finding that there aren't economic  
16       impacts associated with that, because people are  
17       going to have to spend money preparing KOPs and  
18       all kinds of other fun things that they wouldn't  
19       have to otherwise do.

20               So, I'm very happy with the first  
21       section and very disappointed with the second  
22       section. And in terms of what I'd like to see,  
23       moving forward, I don't think anybody wants any  
24       more process, but one way to do that would be to  
25       go back in a workshop, just appendix B, and go

1 through those issues; and see whether you have, in  
2 fact, put power plants in a class of one.

3 I think there's a very good chance that  
4 no other type of industrial facility in the State  
5 of California has to do what appendix B asks us to  
6 do for data requirements.

7 Absent going back through that process,  
8 and my clients will be happy if you decide not to  
9 do that, and I probably will be, too, as much as I  
10 love being here, I think the one thing that  
11 Calpine asks for, and I think other people  
12 supported, was some kind of relief from a data  
13 adequacy dispute.

14 What Calpine had suggested was basically  
15 a process whereby a dispute between the staff and  
16 an applicant could be heard by you all, by the  
17 Standing Siting Committee, as opposed to the full  
18 Commission. Mr. Galati and myself, Taylor, Ray  
19 have all talked about the unsavory possibility of  
20 having to bring a new applicant with a new project  
21 to the full Commission for a data adequacy battle.

22 And so absent, you know, going back and  
23 really going through appendix B and making the  
24 kind of changes that I think you ought to make to  
25 put power plants on the same playing field as all

1 other industrial facilities in California.

2 I would ask you to look long and hard  
3 again at Calpine's comments on pages 6 and 7,  
4 which was a proposed change to section 1709. And  
5 I cut-and-pasted it into a stand-alone document  
6 that I can hand out, if you'd like.

7 But really what that would do is provide  
8 some relief to applicants because moving all the  
9 stuff from discovery into data adequacy really  
10 relieves them of a good forum to challenge. In  
11 the discovery phase if there's a disagreement  
12 between staff and applicant, there's a Committee;  
13 there's a process for a motion to compel; and  
14 there could be hearings; and that ultimately can  
15 be appealed all the way up to the full Commission.

16 But at least it's a known process, and  
17 the clock isn't being held up over a disagreement  
18 about whether something is even needed to start  
19 the process. And so that remedial action, the  
20 changes to 1709 that were proposed by Calpine in  
21 their original comments, which I'll give you again  
22 if you want to look at, would be I guess my plan B  
23 for appendix B. I know plan B is not a popular  
24 term in America right now, but I'd ask you to  
25 reconsider that issue.

1                   Because otherwise then the siting bar,  
2           as you've dubbed this the other day, is going to  
3           be faced with the decision about whether we want  
4           to bring these things to the full Commission. And  
5           I think that's a very inefficient use of  
6           Commissioners' time to hear those kind of disputes  
7           in that forum with five Commissioners and a whole  
8           bunch of staff and a whole bunch of people who are  
9           here to do other things, having to sit through  
10          that process.

11                   That's probably a good summary of where  
12          we are. I guess I would make one more comment.  
13          And this is sort of generic. In talking about the  
14          regulations we decided among ourselves, there's  
15          really kind of four people -- four sets of people  
16          in the world when it comes to your siting  
17          regulations.

18                   First, there are people who will never  
19          be in your process and don't care. Second, there  
20          are people who are not in your process yet and  
21          don't care. Third, there are people who are in  
22          your process and don't want to rock the boat. And  
23          fourth, there are people who have completed your  
24          process and don't want to make it easier for  
25          anybody else to come in behind them.



1                   And so it's very difficult to find a  
2                   constituency for these issues. It really is. And  
3                   I thank my clients for allowing me to use their  
4                   names here today.

5                   And with that I think I'll close.

6                   PRESIDING MEMBER GEESMAN: Ray?

7                   MR. ROUSE: This is Ray Rouse on behalf  
8                   of Galati and Blek. And I just want to say that  
9                   on behalf of Mr. Galati and our firm, we support  
10                  what Mr. Harris just said regarding the data  
11                  adequacy and the, I guess we call it the appeal of  
12                  data adequacy issues.

13                  DR. REEDE: Does Mr. Bachrach have any  
14                  comments?

15                  MR. BACHRACH: No.

16                  DR. REEDE: Thank you.

17                  MR. BACHRACH: No, I have none.

18                  PRESIDING MEMBER GEESMAN: Thank you.

19                  MR. MILLER: I'd just like to interject  
20                  a comment in general support of what Mr. Harris  
21                  has said. And I think it was clear, but wasn't  
22                  entirely to me, at least, what his proposal is, is  
23                  to allow for a kind of an interlocutory appeal of  
24                  data adequacy issues to this Committee, the Siting  
25                  Committee, rather than to the full Commission.

1                   And I just want to make sure there's

2           no --

3                   PRESIDING MEMBER GEESMAN:   Because

4           you're not inhibited from showing us your

5           underwear, but going in front of the full

6           Commission is just too daunting a prospect --

7                   MR. MILLER:   No, I don't think --

8                   PRESIDING MEMBER GEESMAN:   -- to bring

9           these issues in front of --

10                  MR. MILLER:   -- it has anything to do

11           with the underwear.

12                  PRESIDING MEMBER GEESMAN:   Okay, as long

13           as we've got that established.

14                  You know, if, in fact, we do end up

15           spending a lot of time in front of the full

16           Commission on data adequacy disputes, I can assure

17           you the Chair of the Commission is going to ask

18           for an interlocutory procedure. Typically we've

19           been pretty judicious about not using our full

20           Commission time for lengthy, open-ended disputes.

21                  But dealing with the problem in

22           hypothetical is not very appealing. And I think

23           that Jeff points up, very accurately, in fact the

24           same way that we framed it when we initiated the

25           first workshops here, staff has a strong desire to

1 move some of these requirements into data adequacy  
2 threshold type determinations.

3 I think if you look at our case load  
4 now, which has grown considerably from where it's  
5 been in the last couple of years, staff size  
6 hasn't grown. Resources available from their  
7 standpoint to process applications has not  
8 materially increased.

9 There's a desire to spend their time  
10 working on real cases. We've got 9000-plus  
11 megawatts of projects that we've permitted that  
12 are simply sitting on a shelf; haven't proceeded  
13 to construction. May or may not have any basis in  
14 reality.

15 If we were in a tighter situation there,  
16 you know, if we only had an inventory of a couple  
17 thousand, might be a different question. But I  
18 think that the staff's desire to expedite our  
19 cases as a matter of practice is something that  
20 should be lauded.

21 I recognize, and you guys have, I think,  
22 accurately pointed out several times in these  
23 proceedings that that does shift a burden to the  
24 very front end of the filing. And that that  
25 burden is likely to have some costs.

1                   But I think, based on the staff's  
2                   calculation, it's likely to generate savings  
3                   overall; and it certainly will make our siting  
4                   process a lot more efficient.

5                   So that's a long-winded way of saying  
6                   that, Mr. Harris, you've made good arguments  
7                   throughout; you've done a very good job of  
8                   summarizing your arguments this afternoon. But we  
9                   don't find them any more persuasive than we did at  
10                  the very front end. Well founded, perhaps, but I  
11                  think this approach will improve our process. And  
12                  I'm sure that if it doesn't, you and your clients  
13                  will bring it to our attention very very quickly.  
14                  And I would invite you to do so.

15                 DR. REEDE: Commissioner Geesman, at  
16                  this time would you like me to move into the  
17                  proposed schedule?

18                 PRESIDING MEMBER GEESMAN: Yes.

19                 MR. JOHNSON: Can I make a comment on  
20                  the follow up on the --

21                 PRESIDING MEMBER GEESMAN: Yes, Roger.

22                 MR. JOHNSON: -- biology? I was unable  
23                  to reach Paul Richins, but I did review the  
24                  transcript --

25                 DR. REEDE: You're not on.

1                   MR. JOHNSON: Sorry. I wasn't able to  
2 reach Paul Richins but I reviewed the transcript,  
3 and in fact, Mr. Harris and Mr. Taylor had a  
4 discussion with Paul Richins on this topic. And  
5 the result --

6                   DR. REEDE: And we already discussed  
7 that.

8                   MR. JOHNSON: Okay. He said we'd look  
9 into it and apparently we have. And what's  
10 proposed --

11                  PRESIDING MEMBER GEESMAN: Yes. Dr.  
12 Reede provided a very moving dramatic reading from  
13 the transcript.

14                  (Laughter.)

15                  MR. JOHNSON: Thank you.

16                  PRESIDING MEMBER GEESMAN: To the  
17 schedule.

18                  DR. REEDE: Commissioner Geesman, after  
19 the Siting Committee yesterday, I again talked  
20 with the Office of Administrative Law to get  
21 clarification. And they did send me emails.

22                  The errata that is proposed would be  
23 required to go to a 15-day language change because  
24 it's borderline; and their attorney feels rather  
25 to be safe than sorry.

1                   PRESIDING MEMBER GEESMAN: Understood.

2                   DR. REEDE: With that said, scenario one  
3 is the Committee hearing on the revised  
4 regulations today, which is an actual public  
5 comment period ends 45 days from December 29th,  
6 which is February 12th.

7                   The 15-day language changes at this  
8 point in time consist of this one-page errata plus  
9 hopefully the information that we will get on  
10 construction of the additional sentence before  
11 this hearing's over on paragraph 1216 of the  
12 rules. That would be February 13th. And the  
13 mailing would go out that same day. I intend to  
14 have it prepared for your signature prior to that  
15 time.

16                  The Commission would publish the 15-day  
17 language on the 13th. The hearing and adoption  
18 would be at the Energy Commission business meeting  
19 that is currently scheduled for February 28th.  
20 That is 16 days out from the date of mailing.  
21 That's the 16th day from the date of mailing.

22                  The Commission would file the revised  
23 regs and final statement of reasons packaged with  
24 the Office of Administrative Law on or before  
25 March 5th.

1                   The Office of Administrative Law  
2           requires 30 working day review, which is  
3           approximately six weeks. That would make April  
4           13th their final date. At which time it would be  
5           filed by them with the Secretary of State's  
6           Office.

7                   They have said that we've run a pretty  
8           clean notice of proposed actions, and that they  
9           may not require 30 working days, but they require  
10          30 working days.

11                  PRESIDING MEMBER GEESMAN: Okay. Now,  
12          is it your desire then that we keep this record  
13          open until you guys have had a chance to work out  
14          this sentence?

15                  DR. REEDE: Yes. I would ask that, it  
16          shouldn't take more than a couple minutes because  
17          Mr. Joseph has an idea of what he would like; I  
18          have both my senior staff counsel and I have the  
19          deputy chief counsel here. That information can  
20          be resolved.

21                  PRESIDING MEMBER GEESMAN: Okay, why  
22          don't we recess, then, for the next --

23                  DR. REEDE: She's ready.

24                  PRESIDING MEMBER GEESMAN: Oh, okay.

25                  MS. WILLIS: The proposed additional

1 sentence to 1216, ex parte contact, section A,  
2 would read: For purposes of this section  
3 "presiding officer" means all commissioners and  
4 all hearing advisers." And we included all  
5 hearing advisers as opposed to just the assigned  
6 hearing adviser, because just as with staff  
7 counsel, a hearing officer could substitute in for  
8 another.

9 PRESIDING MEMBER GEESMAN: Mr. Joseph?

10 MR. JOSEPH: Just a question. Do you  
11 mean hearing adviser or hearing officer?

12 MS. WILLIS: The correct term for a  
13 hearing officer in our Commission is hearing  
14 adviser.

15 MR. JOSEPH: Okay.

16 MS. WILLIS: That is the job title.

17 MR. HARRIS: And, Kerry, haven't you  
18 left out advisers to commissioners?

19 MS. WILLIS: Well, we thought we covered  
20 it under B, where an adviser to commissioner, any  
21 other members of a commissioner's own staff shall  
22 not be used in any manner that would circumvent  
23 the purposes and intent of this section. Which is  
24 what we've been -- which we've had all along. And  
25 it seems to have worked, as far as I know.



1 But, are you okay?

2 MR. JOSEPH: I think that sounds fine.

3 DR. REEDE: Mr. Harris, Mr. Miller?

4 MR. MILLER: No comment.

5 DR. REEDE: Ray?

6 PRESIDING MEMBER GEESMAN: Dr. Reede,  
7 are we done?

8 DR. REEDE: Yes, sir, if you say so.

9 PRESIDING MEMBER GEESMAN: I have no --

10 DR. REEDE: I have no other items to  
11 bring before this hearing.

12 PRESIDING MEMBER GEESMAN: Commissioner  
13 Byron?

14 ASSOCIATE MEMBER BYRON: I have nothing  
15 else.

16 PRESIDING MEMBER GEESMAN: Nothing up  
17 here. We'll be adjourned. Thank you very much.

18 (Whereupon, at 2:10 p.m., the hearing  
19 was adjourned.)

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## CERTIFICATE OF REPORTER

I, PETER PETTY, an Electronic Reporter,  
do hereby certify that I am a disinterested person  
herein; that I recorded the foregoing California  
Energy Commission Hearing; that it was thereafter  
transcribed into typewriting.

I further certify that I am not of  
counsel or attorney for any of the parties to said  
hearing, nor in any way interested in outcome of  
said hearing.

IN WITNESS WHEREOF, I have hereunto set  
my hand this 24th day of January, 2007.

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